Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1882

GEORGE BOYLAN,

Petitioner,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No.

GEORGE BOYLAN,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT.

Petitioner, GEORGE BOYLAN, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made final in this proceeding on April 29, 1980.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit affirming the judgments of conviction after a jury trial in the Eastern District of New York, George C. Pratt, a District Court

Judge, was rendered on April 29, 1980. This opinion is reproduced in the Appendix (A-1).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 29, 1980. The jurisdiction of this Court is invoked pursuant to 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

Was plain error committed by the trial judge when he not only omitted to charge any of the essential elements of the Taft-Hartley violations (five of them are made the predicate crimes upon which the RICO Count of the indictment is based) but when he also admonished and actually instructed the jury that there was no scienter elements at all involved in the Taft-Hartley predicate violations? That is, that the purpose of the payments is not important? That it does not matter what the intentions of the parties were in making the payments?

Was the trial court in error in denying the defendant an evidentiary hearing in violation of the good faith requirements set forth in *United States v. La Salle National Bank* 437 U.S. 298 when, in the course of argument of the petitioner's request, the special prosecuting attorney advised the court that the investigation of the petitioner by the Internal Revenue Service was criminal throughout; that the Internal Revenue had, evidently, investigated the defendant solely for criminal purposes for two years before referring the matter to the Justice Department when it convened a grand jury?

STATEMENT

The petitioner, George Boylan, was the business manager of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local V. AFL-CIO. The petitioner was indicted on an eleven-count indictment, a consolidated one-count indictment which charged the petitioner with conducting the affairs of the union local through a pattern of racketeering activity in violation of 18 U.S.C., Section 1962(c), made up of five predicate crimes in violation of 29 U.S.C., Section 186(b) (1) (Count One); receiving illegal payments in violation of 29 U.S.C., Section 186(b) (1) by means of violating Section 186(a) (4) thereof (Count Two); *1)* income tax evasion in violation of 26 U.S.C., Section 7201 (Counts Four, Six, Eight, Ten and the separate indictment); and filing false tax returns in violation of 26 U.S.C., Section 7206(1) (Counts Five, Seven, Nine and Eleven).

Petitioner was sentenced to concurrent terms of imprisonment of ten years on the racketeering count, one year on the illegal payments count, five years on each of the tax evasion counts, and three years on each of the false filing counts. In addition, appellant was successively fined $25,000 on the racketeering count and $10,000 on the illegal payments count and each of the evasion counts, for a total fine of $85,000.

The jury had found the petitioner not guilty of Count Three which charged the defendant substantively, as did Count Two, with a Taft-Hartley misdemeanor crime under 29 United States Code 186(b) (1) committed by means of the conduct prohibited in 186(a) (4), thereof; that the petitioner thereafter appealed.

The petitioner, in his appeal to the United States Court of Appeals for the Second Circuit, contended: 1.) that the conviction and sentence of the petitioner on Count Two of the indictment, which was pled as a so-called separate and substantive Taft-Hartley crime, constituted multiple punishment when the petitioner was convicted of the very same crime pled as one of the predicate crimes under the first *RICO* Count of the indictment (Count Two of the indictment is set forth in the Appendix (A-13)); the same predicate crime is set forth in paragraph "2b" of the *RICO* Count of the indictment, Appendix (A-12); 2.) that the omissions of the judge to charge any of the essential elements of the five Taft-Hartley crimes pled in the indictment as the predicate counts under Count One (RICO) and to thereafter charge that essential elements of the so-called substantive Taft-Hartley crimes pled under Counts Two and Three of the indictment were different as to scienter constituted plain error; 3.) that the trial court erred when it failed to grant the petitioner an evidentiary hearing to determine whether the Internal Revenue's new service violated the good faith requirements of the *United States v. La Salle International Bank*, 437 U.S. 298, when it was revealed that up to the time the Justice Department convened an open-ended grand jury the Internal Revenue Service previously had conducted an investigation of the petitioner *solely* for criminal purposes and didn't turn over the results of its investigation to the Justice Department for a period of two years.

An analysis of the indictment disclosed that as to Count One *(RICO)* that the petitioner was charged with five Taft-Hartley predicate crimes framed under Section 186(b) (1) committed by the means proscribed in Section 186(a) (4). That the petitioner had not merely willfully and unlawfully received payments from corporate employers of the union but that these payments were made and received with the intent and for the purpose of providing labor peace and labor productivity to the union

employer as alleged in each and every predicate crime. That only the predicate crime, *as alleged* in the *RICO* Count of the indictment and under the government's theory and proof at trial, spelled out the pattern of racketeering activity required by 18 United States Code, Section 1962(c). That all the acts which constitute the so-called pattern of racketeering activity are nowhere pled in Count One of the indictment except as alleged in the predicate crimes.

An analysis of the indictment disclosed as to Counts Two and Three, where so-called separate and substantive Taft-Hartley crimes are charged, that the essential elements of these two separately pled misdemeanor crimes are identical in scienter elements to the same acts pled as predicate crimes under Count One, the *RICO* Count of the indictment. Count Three of the indictment, Appendix (A-14) is pled as a predicate crime in paragraph "2d" of the indictment, Appendix (A-13) and Count Two of the indictment is pled as a predicate crime under paragraph "2b" of the RICO Count of the indictment, Appendix (A-12).

That since the predicate crimes contain the only scienter elements upon which a *RICO* conviction can be based and since these predicate crimes, which are misdemeanors if proven in accordance with the congressional standards, are the sole basis for a RICO conviction (calling for a twenty-year imprisonment and a twenty-five thousand dollar fine), the petitioner urged that it was plain error within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure for the trial judge not only to omit to instruct the jury as to every scienter element alleged in the indictment and testified to by the government's witnesses concerning every predicate crime; that is, the omission of the trial court to instruct the jury that any element of willfulness was involved in the RICO Count and Counts Two and Three of the

indictment; but that in order to convict the petitioner of the predicate crimes and the so-called substantive Taft-Hartley crimes (Counts Two and Three) that the jury would have to find, if so instructed by the trial judge, that the payments were made to the petitioner for the purposes alleged and as testified to by the government's witnesses; that is, they were given with the intent and for the purpose of securing labor productivity and labor peace in the employer's dealings with the union; that these omissions of the trial judge were grievous errors in and of themselves; however, these omissions were compounded when the trial judge affirmatively admonished the jury that with respect to the predicate crimes under Count One *(RICO)* that the purpose of the payments as alleged and sought to be proven under the government's theory do not matter at all; that the intent of the parties in making the payments does not matter; that the sole element under the predicate crimes was any purposeless payment from an employer of the union to the petitioner, an official of it, and that each payment is a separate crime.

That the trial court thereafter in charging the so-called essential elements of the separate substantive Taft-Hartley crimes (Counts Two and Three) surely confused the jury by instructing it that these so-called substantively pled crimes involved an element not pled or involved in the predicate crimes under Count One; to wit, the element of intent, whereas this same essential scienter element was pled in the predicate crimes in a much more sufficient manner than the manner in which it was attempted to be pled in Counts Two and Three of the indictment by merely framing it in the statutory language of Section 186(a)(4) of Title 29 of the United States Code. That it is respectfully submitted that the United States Court of Appeals came to the wrong conclusion in its analysis of the indictment and the trial judge's charges to the jury with respect to the same. In finding that the petitioner not only did not object to the

omissions of the trial court to charge the essential elements of the predicate crimes and that he actually requested that the judge not include them in his charge; that the petitioner was not injured by the charge as delivered. This is not so for all the reasons hereinafter stated.

The petitioner also respectfully submits that the United States Court of Appeals for the Second Circuit was wrong in concluding that the trial court did not err in denying the petitioner an evidentiary hearing because of the violation of the good faith requirement by the Internal Revenue Service's criminal investigation as found in *United States v. La Salle International Bank* for all of the reasons hereinafter stated.

REASONS FOR GRANTING OF THE WRIT

18 USC Sections 1961-68 *(RICO)* is described as "the most sweeping criminal statute ever passed by Congress" with "great potential for abuse against individual defendants." Atkinson, *Racketeer Influenced And Corrupt Organizations, 18 U.S.C., Sections 1961-68: Broadest Of The Federal Criminal Statutes,* 69 J. of Crim. Law & Criminology 1, 6 (1978).

This is especially true when less heinous crimes, such as two or more Taft-Hartley offenses (misdemeanors), are employable as predicates to a RICO violation and thereby turned into a potential twenty-year, twenty-five thousand dollar fine upon conviction. If, as is held in *U.S. v. Stofsky,* 409 F. supp. 609, 612 and as found by the Court of Appeals below, "the RICO Count does not include a scienter element over and above that required by the predicate crimes", it is fundamental error for a Judge, in a case tried to a jury, not to submit to the jury the essential ingredients of the Taft-Hartley predicate offenses which are the

only offenses upon which the RICO conviction can stand. In the trial at bar the trial judge not only failed to submit to the jury the essential ingredients of the Taft-Hartley predicate offenses in the *RICO* Count, Count One, but he even actually admonished the jury that no scienter elements were involved or existed in the predicate crimes alleged in the *RICO* Count of the indictment (Count One; Appendix A-10).

The Court of Appeals in its opinion below states: "Section 186(b) (1) prohibits the receipt of payments proscribed in Section 186(a). Section 186(a) (4) prohibits payments made with intent to influence a labor representative concerning union activities".[1] (Appendix A-9).

Applying these Taft-Hartley statutes to the *RICO* Count of the indictment and Counts Two and Three (the so-called separate and substantive Counts) it is clear that the grand jury's theory and the government's theory and proof at trial was not that the defendant merely accepted prohibited payments under 186(b)(1) by means of 186(a) (1), but that the payments were given by employers and accepted by the defendant with the intent and *for the purpose of providing labor productivity and labor peace* in violation of 186(b)(1) by means of 186(a)(4). In fact, this allegation in each predicate crime provides the factual nexus of the racketeering count and these acts constitute the pattern of racketeering activity required by 18 U.S.C., Section 1962(c), that is, participating in the conduct of an enterprise's affairs through a pattern of such activity.

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[1]. The indictment does not specify by number the particular subparagraph of Sec. 186(a) meant to be encompassed in the predicate violations of 186(b) (1), but it is clear under its language that the predicate crimes allege that payments were made for the purpose and with the intent to influence the defendant, a union official, concerning union activities, that is, the payments were made "for productive labor and labor peace" under Section 186(a)(4).

There were thus two essential scienter elements pled in every predicate crime (in the *RICO* Count) which were required to be proven and charged; i.e., 1) payments were received wilfully and knowingly; 2) and made for the purpose and with the intent of providing labor peace and productivity in violation of Section 186(a)(4) (A-9). Here the trial judge did not instruct the jury in even the language of the statutes involved, that is, 186(d), which requires a person at least to wilfully violate some provision of the section or in the language of Section 186(a)(4) which makes it unlawful for any employer to pay money or anything of value to an officer of a union with the intent to influence him in respect to any of his actions and decisions, et cetera, (specifically here to provide labor peace and labor productivity for the payments). The trial judge charged that the sole element of every predicate crime under Count One was payment:

> "Under that section (186) it is unlawful for any employee, representative or union officer to accept any money from an employer of the union members. The purpose of the payment is not important...Each such payment is a separate crime."

Thereafter, the trial judge, in charging what he termed an additional element (intent) involved in the so-called separate and different substantive Taft-Hartley offenses (Counts Two and Three) which are not separate and different at all from the predicate crimes as to any scienter element, the Court instructed:

> "In other words, under the racketeering activity aspect of these payments, it does not matter *what the intention* of the parties was. The mere fact of a payment would be a violation there..." (Emphasis supplied.)

The Court below in its opinion states: "Not only did Boylan not object...to these omissions, but he actually requested the Judge not to include them". This is not correct at all. The trial court, in ignorance of the law, colloquied to defense counsel that there is no element of willfulness involved in either the RICO Count or the Taft-Hartley Count[2]. Defense counsel, in ignorance of the law, acquiesced in this pronouncement of the law by the trial judge. The only omission in the trial court's instructions which defendant's counsel conceivably consented to was the sole "element of wilfulness". Be that as it may, this omission is a far cry from what the judge actually later charged the jury as to the predicate crimes in the RICO Count; namely, "The purpose of the payment is not important...it does not matter what the intention of the parties was", for this charge did away not only with the element of wilfulness specified in Section 186(d), but it took away from the jury's consideration the most important and essential ingredient out of the predicate crimes; namely, each allegation and the alleged proof by the government through all its witnesses' testimony, if credited, that the payments were given and received for the purpose and with the intention of providing labor peace and labor productivity. That although the indictment could have pled payment as the sole element in the predicate crimes (wilfully and knowingly received; 186(a)(1)), thus making the prohibited act of payment *malum prohibitum (U.S. v. Ryan,*

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[2](The Court:) "My present understanding of the law is that there is no element of wilfulness involved in either the RICO count or the Taft-Hartley counts.

There is an element of knowledge, but I don't think it is an issue in this case. The evidence of the payments is not that somebody was surreptitiously putting money in his bank account when he didn't know they were doing it. If they find the payments were made, knowledge, even wilfulness would probably follow automatically. *Unless you specifically want me to charge on that aspect of it, I will simply ignore it.*"

"Mr. Correri (Defense Counsel): I think it should be ignored. I don't think there's anything in that area that (sic) (as) your Honor has indicated."

350 U.S. 299, 305), the indictment at bar, as authorized under 186(a) (4), pled that the very purpose and intent of the payments was to provide labor peace and productivity, which each government witness testified to without exception.

The trial judge surely confused the jury and he severely prejudiced the defendant's case when he thereafter charged as to Counts Two and Three that an additional element (intent) was involved which was not involved in the predicate offenses. In truth and fact, the payments received under Counts Two and Three were made with the same intent for the very same purpose as those made and received in Count One; namely, to provide labor peace and labor productivity as testified to by the government's witnesses. In fact, the predicate crimes, paragraph "2b" and paragraph "2d" thereof, plead in a much more sufficient manner each and every element of the same identical crimes which were sought to be pled and proved in Counts Two and Three of the indictment as separate substantive counts. In charging Counts Two and Three, which are framed in the statutory language of Section 186(a) (4), the Court merely paraphrased the statutory language[3]. Although it may be proper to employ the language of a statute in an instruction "if the statutory words are of clear and simple import and generally understood meaning." 2 C. Wright, *Federal Practice & Procedure*, Section 485 at 293 (1969); see also *Lumetta v. United States*, 362 F.2d 644 (8th Cir. 1966), that practice is reversible error when the statutory words fail to achieve the necessary end "that the jury may have a clear understanding of the law before

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[3]"The second and third counts, however, require one additional element that is not present or that is not required for conduct to be racketeering activity under the first count.

That additional element is the third element of this crime, which is the Defendant received the money with an intent to be influenced in respect to his actions, decisions or duties as business agent of Local 5.

applying it to the facts." *Morris v. United States*, 156 F.2d 525, 529 (9th Cir. 1946). Here, the jury received no clear understanding of the law when the court dichotomized its instructions to the jury and informed the jury that the elements required to convict under Counts Two and Three weren't required in order to find the defendant guilty of the same predicate acts pled in the *RICO* Count of the indictment.

It would have been much more appropriate for the court to instruct it in accordance with the theory and the facts which were sought to be proved by the government under the indictment, namely, that the payments were given and received for labor productivity and labor peace. It is significant to note that when the trial court got around to instructing the jury as to Counts Two and Three and that Section 186(a) (4) required some kind of intention, and that the intention of the parties mattered, the jury, for reasons best known to it, acquitted the defendant of Count Three of the indictment. The Court of Appeals, in its opinion as to the instruction of the trial court as to Count Two states that in imposing an intent element on the defendant, a taker, the charge became more favorable to the defendant than required. If the intent should be on the maker by statute, just as it was in each and every predicate crime, how does this relieve the trial court from instructing a fundamental element of the statute setting forth the specifications required to be proved by the facts of the case, whether it be on the maker or the taker?

The United States Court of Appeals' statement in its opinion (Appendix A-6) that "the question of intent was never an issue in the trial" is certainly misplaced, since there is no burden on the defendant to prove, disprove or dispute the government's case or to do anything with reference to it for that matter. The fact that the question of intent was not made a specific issue by the defendant doesn't relieve the trial court from instructing the jury

as to the essential elements required to be proved under the theory of the government as pled and alleged beyond a reasonable doubt. Under all of the Taft-Hartley offenses, predicate or otherwise, the intent of the parties in making the payment was paramount, and by statute it was made an essential element of the proscribed criminal conduct. Indeed the purposes of the payments which were to provide labor productivity and labor peace comprise the factual nexus which connected the payments to the union officer with the enterprise, the union, and they spelled out the pattern of racketeering activity. Nowhere else in the *RICO* Count, except in the predicate crimes, is the pattern attempted to be identified or spelled out. The courts below overlook the very theory and proof of the government which the jury would have to be apprised of and instructed as to in order for the jury to draw appropriate conclusions from the evidence. This court has held in *Bollenbach v. U.S.* 326 US 607, 614:

> "...the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

Here, as to the *RICO* Count, the relevant legal criteria was charged out of the case by the judge. The jury was told it didn't exist; that the purpose of the payments wasn't important; that the intention of the parties in making the payments wasn't important; that payment alone was sufficient. Defendant's counsel never acquiesced in this. These weren't omissions, as was the trial judge's failure to charge the element of wilfullness. These were errors of comission by the trial judge and they constitute plain error as a matter of law under Rule 52(b) of the *Federal Rules of Criminal Procedure.*

The trial judge's charge as to the RICO Count amounted to a directed verdict, no matter how conclusive the evidence of

payments. When the trial judge got around to instructing the jury as to the question of intent as to the payments under Counts Two and Three at least by paraphrasing the language of the statute, the defendant was acquitted of Count Three. That as to the RICO Count:

> "There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions...a failure to charge correctly is not harmless since the verdict might have resulted from the incorrect instruction...no matter how clear the evidence, they are entitled to have the jury instructed in accordance with the standards which Congress has prescribed." (*United Broth. of Carpenters & Joiners of America v. United States*, 330 U.S. 395 408-410.)

Here only the scienter elements are found in the predicate crimes. Here the trial court not only failed "to submit to the jury the essential ingredients of the only offense(s) on which the conviction could rest", it instructed the jury that they didn't exist; that the government's theory, as pled in the indictment and allegedly proven by the testimony of witnesses, was not to be submitted to the jury for its consideration. This is plain error which may be observed by the court on its own motion (*Screws v. United States*, 325 U.S. 91, 106-107).

The most persuasive reason as to why this court should grant certiorari upon the failure of the court below to grant the petitioner an evidentiary hearing to determine whether the Internal Revenue Service acted in bad faith in investigating the petitioner for criminal purposes solely for a period of two years before referring its determination to prosecute the petitioner to the Department of Justice and its evidence to a convened grand jury is found in the admission by the government's spokesman, in opposing the petitioner's request, that the investigation of the petitioner by the Internal Revenue Service was a criminal

investigation throughout conducted by the criminal branch of the Internal Revenue Service.

This court has held that ordinarily the burden to show that the Internal Revenue Service acted in bad faith is a heavy one. That since criminal and civil fraud liabilities are coterminous, the Service rarely will be found to have acted in bad faith by pursuing the former:

> "As a result, the question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS." and not by the personal intent of the special agent (United States v. La Salle National Bank, supra, p. 2367).

That although the petitioner, upon information and belief, sought such a hearing upon the grounds that the records and evidence which led to the prosecution of the petitioner may have been obtained through the unlawful cooperation of the Internal Revenue Service and the Department of Justice, the petitioner, nevertheless, maintained in his moving papers that these records were obtained in contravention of the constitutionally protected rights of the defendant. Accordingly, any such application for an evidentiary hearing to determine whether an investigation has solely criminal purposes by the Internal Revenue Service could best be quickly answered candidly by the Internal Revenue Service or its spokesman. During the course of the petitioner's application and its argument, the special prosecuting attorney, who was also one of the presenting attorney's to the grand jury, advised the court:

> "But this (I.R.S.'s) was a criminal investigation throughout; initially conducted by the criminal branch of the I.R.S., then conducted jointly with the Brooklyn Strike Force."

That although the record does disclose, as found in the opinion of the United States Court of Appeals below, Appendix (A-7), that the Internal Revenue Service did not unlawfully cooperate with the Justice Department, the issue to be determined by the trial judge was whether or not the good faith standard set forth in this court's decision in *United States v. La Salle International Bank*, supra, were presumptively violated and to grant a hearing to determine if they were.

The statement by the special government prosecutor and presenting attorney to the grand jury that the investigation by IRS was a criminal investigation throughout initially conducted by the criminal branch of the IRS and thereafter jointly with the Brooklyn Strike Force is still in all respects true as far as the petitioner's knows and as was thereafter borne out by the trial testimony of Internal Revenue Agent John J. Page, who testified at the trial of the petitioner "there is no civil report as of this date" that he, as an Internal Revenue Agent, as distinguished from the special agents who had heretofore exclusively worked on the case, assisted the said special agents in the preparation of their criminal reports in the area of tax knowledge and expertise on the book and records. That the special agents determined that the investigation should proceed along criminal lines before Agent Page got involved for criminal prosecution purposes approximately five months before his testimony at trial.

That the government and the Internal Revenue Service has failed to deny through any spokesman that the time of the petitioner's application for an evidentiary hearing and certainly thereafter that the Internal Revenue Service's investigation of the petitioner was not solely for criminal purposes as stated in the record by the special prosecutor above and that the civil aspect of the petitioner's tax liability did not come into play until after it was determined to prosecute the petitioner criminally. That,

accordingly, the petitioner met his burden of proof to the extent of showing that an evidentiary hearing was required to determine whether the investigation of the petitioner by the Internal Revenue Service was in fact solely for criminal purposes—whether the I.R.S. on its own became an information gathering agency for the Department of Justice—that it had determined to prosecute the petitioner criminally from the offset of its investigation—and abandoned its collection of any civil tax liability.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THIS COURT SHOULD ISSUE ITS WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW.

Respectfully submitted,

ANTHONY F. CORRERI and
JAMES R. MOFFATT
Attorneys for Petitioner

APPENDIX A
(Opinions)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 785—September Term, 1979.

(Argued March 18, 1980 Decided April 29, 1980.)

Docket No. 79-1430

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE BOYLAN,

Appellant.

Before:

MULLIGAN, OAKES, *Circuit Judges*, and
POLLACK, *District Judge**

Appeal from judgments of conviction entered after a jury trial in the Eastern District of New York, George C. Pratt, District Judge, for racketeering, illegal payments

* Honorable Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

in violation of the Labor Management Relations Act, income tax evasion, and false filings.

Affirmed.

ANTHONY F. CORRERI, Mineola, New York (James R. Moffatt on the brief) *for appellant.*

LOTHAR R. GENGE, Special Asst. U.S. Atty. (Edward R. Korman, United States Attorney, Brooklyn, N.Y.; Thomas Puccio, Miles M. Tepper, Joel Cohen, Assistant U.S. Attorneys, on the brief) *for appellee.*

POLLACK, D.J.

Appellant George Boylan, the business manager of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 5, AFL-CIO, was tried before Judge George C. Pratt and a jury in the Eastern District of New York on two consolidated indictments. He now appeals his conviction on 11 of the 12 counts charged therein: one count of conducting the affairs of a union local through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c)[1] (the RICO count); one count of receiving illegal payments in violation of 29 U.S.C. § 186(b) (1)[2] (the illegal payments

1 18 U.S.C. § 1962(c) reads:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

2 § 186(b) (1) reads:

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or

count); five counts of income tax evasion in violation of 26 U.S.C. § 7201; and four counts of filing false tax returns in violation of 26 U.S.C. § 7206(1). He was sentenced to terms of imprisonment of 10 years on the RICO count, one year on the illegal payments count, five years on each of the tax evasion counts, and three years on each of the false filing counts, all to run concurrently. In addition, he was fined a total of $85,000: $25,000 on the RICO count, and $10,000 on the illegal payments count and on each evasion count.

On appeal, Boylan argues that the RICO count and the illegal payments count are multiplicitous, and that the

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delivery of any money or other thing of value prohibited by subsection (a) of this section.

§ 186(a) reads:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

The payments charged in Count Two are violations of § 186(a)(4).

sentences imposed constitute multiple punishment.[3] Appellant's argument is unpersuasive on both statutory and constitutional grounds, and requires no recital of the overwhelming evidence produced at trial of the large scale payments Boylan received from construction companies that employed members of Local 5 to work on electrical power plants.

This Circuit has recently held that separate judgments of conviction may not be entered for bank robbery under 18 U.S.C. § 2113(a) and armed bank robbery under 18 U.S.C. § 2113(d), when the convictions arise out of a single criminal transaction. We also held that the government may not prosecute a defendant under both 18 U.S.C. § 924(c) (1) (use of a firearm to commit a felony) and 18 U.S.C. § 2113(d) (armed bank robbery). *Grimes v. United States*, 607 F.2d 6 (2d Cir. 1979). The rationale underlying these holdings is that a single transaction should not be turned into multiple offenses absent clear evidence of congressional intent to create separate crimes.

In the case at hand, however, Congress clearly defined separate crimes. The purpose of RICO was to establish "new penal prohibitions, and . . . enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, *reprinted in* [1970] U.S. Code Cong. & Ad. News 1073. As the Ninth Circuit has written in *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979):

---

[3] Since the one year's imprisonment imposed on the illegal payments count will run concurrently with the ten years imposed on the RICO count, the practical result for which Boylan is contending is that his $85,000 fine should be reduced by $10,000, the amount imposed on the illegal payments count.

> There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions.

Nor does such a plan violate the double jeopardy test set out in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), where the Supreme Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The two statutes involved in the present case do not proscribe the same act or transaction, and they implement different congressional purposes. One proscribes the receipt of illegal payments by union officials and stems from congressional concern with the integrity of labor organizations. The other proscribes a "pattern" of illegal activities, and arises from congressional concern over the influence of organized crime. It is clear that in the case before us, Congress intended to create separate crimes, separately punishable. *See Whalen v. United States*, ____ U.S. ____, 48 U.S.L.W. 4406 (April 15, 1980).

Accordingly, there is no multiplicity in convicting and sentencing Boylan separately on the RICO and the illegal payment counts.

Appellant's other arguments are similarly unpersuasive. He cannot attack the judge's charge to the jury for omitting instructions that the payments must have been taken willfully and in exchange for labor peace. The question of intent was never in issue at the trial. Boylan's entire defense was a denial of ever having received any payments at all. Not only did Boylan not object below to these "omissions", but he actually requested that the judge not include them. He cannot now attack the jury charge for omitting the very instructions he successfully excluded.

Futhermore, Boylan was not injured by the charge as delivered. The RICO count does not include a scienter element over and above that required by the predicate crimes, in this case the violations of 29 U.S.C. § 186(b)(1). Section 186(b)(1) prohibits the receipt of payments proscribed in § 186(a). Section 186(a)(4) prohibits payments made with intent to influence a labor representative concerning union activities. The indictment herein charged the taker, not the maker of the payment. Section 186(a)(4) is posited on the intent of the maker of the payment. Consequently in imposing an intent element on the defendant, a taker, the charge became more favorable to defendant than required by *United States v. Ricciardi*, 357 F.2d 91, 99 (2d Cir. 1966).

Finally Boylan argues that Judge Pratt erred in denying him an evidentiary hearing on whether his tax returns and the bank records from certain sham corporations used to channel the illegal payments were obtained by means of improper cooperation between the Internal Revenue Service and the Department of Justice in violation of the good

faith requirement of *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). The IRS investigation was first directed against the employers and uncovered payments by them to dummy corporations. The prosecuting attorney's detailed affidavit showed that the proper authorizations to obtain the tax returns were followed, namely, authorization from the Attorney General to seek a Court order and obtaining such an order pursuant to 26 U.S.C. § 6103(i) (1). The conclusory affidavit of Boylan's trial attorney that "it must be assumed that there was inter-agency cooperation" is hardly a basis for a hearing under *LaSalle*, *cit. supra*. There is no evidence in this record on which to question the ruling below.

The judgments of conviction are in all respects affirmed.

APPENDIX "B"
(STATUTES)

CRIMES AND CRIMINAL PROCEDURE 18 § 1961

CHAPTER 96 — RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.
1961. Definitions.
1962. Prohibited racketeering activities.
1963. Criminal penalties.
1964. Civil remedies.
1965. Venue and process.
1966. Expedition of actions.
1967. Evidence.
1968. Civil investigative demand.

1970 Amendment. Pub.L. 91-452, Title IX, § 901 (a), Oct. 15, 1970, 84 Stat. 941, added chapter 96 and items 1961-1968.

§ 1961. Definitions.

As used in this chapter—

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

18 U.S.C. 1962

§ 1962. Prohibited activities.

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * *

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT — Cont'd

§ 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

APPENDIX "C"

INDICTMENT

Cr. No. 79CR353
(18 U.S.C. § 1962(c), 26 U.S.C. § 7201,
26 U.S.C. § 7206 (1), 29 U.S.C. § 186)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

v.

GEORGE BOYLAN

Defendant

----------X

THE GRAND JURY CHARGES:

COUNT ONE

1. At all times material to this Indictment, and specifically from on or about January 1, 1965 to the filing of the instant indictment:

(a) The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 5, AFL-CIO, (hereinafter Local Lodge No. 5) was a labor organization engaged in an industry affecting commerce within the meaning of Title 29, United States Code, Sections 142 and 152 located at 320 Northern Boulevard, Great Neck, New York.

(b) Local Lodge No. 5 was an "enterprise" as that term is defined in Title 18, United States Code, Section 1961(4).

(c) Local Lodge No. 5 was engaged in and its activities affected interstate and foreign commerce.

(d) Treadwell Corporation, T.D. McCormick Contracting Co., Inc., Champion Construction Company, Inc., and Combustion Engineering Inc., were employers within the meaning of Title 29, United States Code, Sections 142 and 152 engaged in the business of erecting industrial boilers in the State of New York and elsewhere, in an industry affecting commerce, and had collective bargaining agreements with Local Lodge No. 5

(e) The defendant GEORGE BOYLAN served as Business Manager of Local Lodge No. 5 and acted as representative of Local Lodge No. 5, members of which were employed by Treadwell Corporation, T.D. McCormick Contracting Co., Inc., Champion Construction Company Inc. and Combustion Engineering Inc.

2. From on or about January 1, 1965 to the filing of the instant indictment, within the Eastern District of New York and elsewhere, the defendant GEORGE BOYLAN knowingly, wilfully and unlawfully did conduct and participate, directly and indirectly, in the conduct of the affairs of Local Lodge No. 5 through a pattern of racketeering activity consisting of violations of Title 29, United States Code, Section 186(b) by unlawfully, wilfully, and knowingly requesting, demanding, receiving, and accepting, and agreeing to receive and accept as an officer, agent, representative and employee of Local Lodge No. 5 the sum of approximately one million dollars ($1,000,000) from agents and representatives of Treadwell Corporation, T.D. McCormick Contracting Co., Inc., Champion Construction Company Inc. and Combustion Engineering Inc., and other companies known to the Grand Jury, including the following:

(a) From on or about January 1, 1965 to on or about December 31, 1973, within the Eastern District of New York and elsewhere, the defendant GEORGE BOYLAN, as an officer, agent, representative and employee of Local Lodge No. 5 unlawfully, wilfully and knowingly did request, demand, receive, and accept, and agree to accept the sum of approximately one hundred thousand dollars ($100,000) from Treadwell Corporation and Robert Spitzer, an agent and representative of said corporation, for productive labor and labor peace, in violation of Title 29, United States Code, Section 186(b);

(b) From on or about January 1, 1969 to on or about December 31, 1976, within the Eastern District of New York and elsewhere, the defendant GEORGE BOYLAN, as an officer, agent, representative and employee of Local Lodge No. 5 unlawfully, wilfully, and knowingly did request, demand, receive, and accept, and agree to receive and accept the sum of approximately five hundred thousand dollars ($500,000) from Treadwell Corporation and Burton Willis, an agent and representative of said corporation, for productive labor and labor peace, in violation of Title 29, United States Code, Section 186(b);

(c) From on or about January 1, 1965 to on or about December 31, 1971, within the Eastern District of New York and elsewhere, the defendant GEORGE BOYLAN, as an officer, agent, representative and employee of Local Lodge No. 5 unlawfully, wilfully and knowingly did request, demand, receive, and accept, and agree to receive and accept the sum of approximately thirty thousand dollars ($30,000) from Champion Construction Company, Inc., and George Koch, an agent and representative of said corporation, for productive labor and labor peace, in violation of Title 29, United States Code, Section 186(b);

(d) From on or about January 1, 1968 through on or about December 31, 1976, within the Eastern District of New York and elsewhere, the defendant GEORGE BOYLAN, as an officer, agent, representative and employee of Local Lodge No. 5 unlawfully, wilfully and knowingly did request, demand, receive, and accept, and agree to receive and accept the sum of approximately three hundred sixty thousand dollars ($360,000) from T.D. McCormick Contracting Co., Inc., and John Dapcich, an agent and representative of said corporation, for productive labor and labor peace, in violation of Title 29, United States Code, Section 186(b).

(e) From on or about June 1, 1970, through on or about October 31, 1973, within the Eastern District of New York and elsewhere, the defendant GEORGE BOYLAN, as an officer, agent, representative and employee of Local Lodge No. 5 unlawfully, wilfully and knowingly did request, demand, receive, and accept, and agree to receive and accept the sum of approximately twenty-three thousand dollars ($23,000) from Combustion Engineering, Inc. and John Randall, an agent and representative of said corporation, for productive labor and labor peace, in violation of Title 29, United States Code, Section 186(b).

(Title 18, United States Code, Section 1962(c))

COUNT TWO

1. Paragraph 1 of Count One of this Indictment is hereby realleged and incorporated as though set forth in full herein.

2. From on or about June 8, 1974 through on or about December 31, 1976, within the Eastern District of New York and elsewhere, the defendant GEORGE BOYLAN, as an officer and

employee of Local Lodge No. 5, and with intent to be influenced with respect to his actions, decisions and duties as such officer, employee and representative of Local Lodge No. 5, unlawfully, wilfully and knowingly did request, demand, receive, and accept and agree to receive and accept the sum of approximately ninety-four thousand dollars ($94,000) from Treadwell Corporation and Burton Willis, an agent and representative of said corporation. (Title 29, United States Code, Sections 186(a) (4) and 186(b) (1)

COUNT THREE

1. Paragraph 1 of Count One of this Indictment is hereby realleged and incorporated as though set forth in full herein.

2. From on or about June 8, 1974 through on or about December 31, 1976, within the Eastern District of New York and elsewhere, the defendant GEORGE BOYLAN, as an officer and employee of Local Lodge No. 5, and with intent to be influenced with respect to his actions, decisions and duties as such officer, employee and representative of Local Lodge No. 5, unlawfully, wilfully and knowingly did request, demand, receive, and accept and agree to receive and accept the sum of approximately one hundred forty-five thousand dollars ($145,000) from T.D. McCormick Contracting Co., Inc. and John Dapcich, an agent and representative of said corporation.
(Title 29, United States Code, Sections 186(a)(4) and 186(b)(1))

COUNT FOUR

On or about the 15th day of April 1974, in the Eastern District of New York, the defendant GEORGE BOYLAN, a resident of 258 Woodbury Road, Hicksville, New York who during the calendar year 1973 was married, did wilfully and knowingly

attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1973, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of New York, a false and fraudulent income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for the said calendar year was the sum of $32,995.80 and that the tax due and owing thereon was the sum of $9,078.24, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was substantially in excess of $32,995.80 and the income tax due and owing to the United States of America was substantially in excess of $9,078.24.

(Title 26, United States Code, Section 7201)

COUNT FIVE

On or about the 15th day of April 1974, in the Eastern District of New York, the defendant GEORGE BOYLAN, a resident of 258 Woodbury Road, Hicksville, New York who during the calendar year 1973 was married, did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1973, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the return reported that the joint taxable income for the said calendar year was the sum of $32,995.80 and that the tax due and owing thereon was the sum of $9,078.24, whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated and owed substantial taxes in addition to the

amount reported in the return.

(Title 26, United States Code, Section 7206(1))

COUNT SIX

On or about the 15th day of April 1975, in the Eastern District of New York, the defendant GEORGE BOYLAN, a resident of 258 Woodbury Road, Hicksville, New York who during the calendar year 1974 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1974, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of New York, a false and fraudulent income tax return on behalf of himself and his wife, which was filed with the Internal Rvenue Service, wherein it was stated that their taxable income for the said calendar year was the sum of $30,175.08 and that the tax due and owing thereon was the sum of $7,948.67, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was substantially in excess of $30,175.08 and the income tax due and owing to the United States of America was substantially in excess of $7,948.67.

(Title 26, United States Code, Section 7201)

COUNT SEVEN

On or about the 15th day of April 1975, in the Eastern District of New York, the defendant GEORGE BOYLAN, a resident of 258 Woodbury Road, Hicksville, New York who during the calendar year 1974 was married, did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1974, which was

verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the return reported that the joint taxable income for the said calendar year was the sum of $30,175.08 and that the tax due and owing thereon was the sum of $7,948.67 whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated and owed substantial taxes in addition to the amount reported in the return.

(Title 26, United States Code, Section 7206(1))

COUNT EIGHT

On or about the 15th day of April 1976, in the Eastern District of New York, the defendant GEORGE BOYLAN, a resident of 258 Woodbury Road, Hicksville, New York who during the calendar year 1975 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1975, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of New York, a false and fraudulent income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for the said calendar year was the sum of $36,180.39 and that the tax due and owing thereon was the sum of $10,271.17, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was substantially in excess of $36,180.39 and the income tax due and owing to the United States of America was substantially in excess of $10,271.17.

(Title 26, United States Code, Section 7201)

COUNT NINE

On or about the 15th day of April 1976, in the Eastern District of New York, the defendant GEORGE BOYLAN, a resident of 258 Woodbury Road, Hicksville, New York who during the calendar year 1975 was married, did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1975, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the return reported that the joint taxable income for the said calendar year was the sum of $36,180.39 and that the tax due and owing thereon was the sum of $10,271.17, whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated and owed substantial taxes in addition to the amount reported in the return.

(Title 26, United States Code, Section 7206(1))

COUNT TEN

On or about the 15th day of April 1977, in the Eastern District of New York, the defendant GEORGE BOYLAN, a resident of 258 Woodbury Road, Hickville, New York who during the calendar year 1976 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1976, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of New York, a false and fraudulent income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service, wherein

it was stated that their taxable income for the said calendar year was the sum of $44,314.03 and that the tax due and owing thereon was the sum of $14,030.73, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was substantially in excess of $44,314.03 and the income tax due and owing to the United States of America was substantially in excess of $14,030.73.

(Title 26, United States Code, Section 7201)

COUNT ELEVEN

On or about the 15th day of April, 1977, in the Eastern District of New York, the defendant GEORGE BOYLAN, a resident of 258 Woodbury Road, Hickville, New York who during the calendar year 1976 was married, did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1976, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the return reported that the joint taxable income for the said calendar year was the sum of $44,314.03 and that the tax due and owing thereon was the sum of $14,130.73, whereas, as he then and there well knew and believed, he received substantial income in addition to that

heretofore stated and owed substantial taxes in addition to the amount reported in the return.

(Title 26, United States Code, Section 7206(1))

A TRUE BILL

_____

FOREMAN

_____

EDWARD R. KORMAN
United States Attorney
Eastern District of New York

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

—*v*—

GEORGE BOYLAN

Defendant

----------X

THE GRAND JURY CHARGES:

That on or about the 15th day of April 1973, in the Eastern District of New York, the defendant George Boylan, a resident of 258 Woodbury Road, Hicksville, New York, who during the calendar year 1972 was married, did wilfully and knowingly

attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1972, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of New York, a false and fraudulent income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for the said calendar year was the sum of $28,092.50 and that the tax due and owing thereon was the sum of $7,136.08, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of approximately $181,211.76, upon which said taxable income there was owing to the United States of America an income tax of approximately $98,016.11.

(Title 26, United States Code, Section 7201)

A TRUE BILL

_____

FOREMAN

_____

EDWARD R. KORMAN
United States Attorney
Eastern District of New York

Supreme Court, U. S.
FILED
AUG1 1980
MICHAEL RODAK, JR., CLERK

No. 79-1882

In the Supreme Court of the United States

OCTOBER TERM, 1979

GEORGE BOYLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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GEORGE BOYLAN, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the district court erred in omitting jury instructions to the effect that petitioner's receipt of payments from several construction companies during a period in which he served as business manager of a labor organization representing employees of those companies could not be found to have violated 29 U.S.C. 186(b)(1) unless it was shown that he took such payments willfully and in exchange for productive labor and labor peace.

2. Whether the district court improperly denied petitioner an evidentiary hearing on his contention that certain records were obtained by the IRS in violation of the good faith requirements set out in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 through A-7) is at 620 F.2d 359.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1980. The petition for a writ of certiorari was filed on May 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on ten counts of an eleven-count indictment and on a consolidated one-count indictment. Specifically he was convicted of conducting the affairs of a union local through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 1); receiving illegal payments, in violation of 29 U.S.C. 186(b)(1) and (a)(4) (Count 2);[1] income tax evasion, in violation of 26 U.S.C. 7201 (Counts 4, 6, 8, 10 and the separate indictment); and filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 5, 7, 9 and 11). He was sentenced to concurrent terms of imprisonment of ten years on the racketeering count, one year on the illegal payments count, five years on each of the income tax evasion counts, and three years on each of the false filing counts. Petitioner was also fined $85,000. The

[1] Petitioner was acquitted on Count 3, which also charged the receipt of illegal payments.

court of appeals affirmed (Pet. App. A-1 through A-7).

The evidence at trial showed that between January 1, 1965, and April 15, 1977, petitioner conducted the affairs of union Local 5[2] through a pattern of racketeering activity by demanding and receiving approximately $1,000,000 in cash payoffs from officers of six different corporations whose employees were represented by Local 5. The evidence also showed that petitioner evaded paying federal income tax on the payoffs for the calendar years 1972 through 1976 and that he filed false federal income tax returns for calendar years 1973 through 1976.

Petitioner was elected business manager of Local 5 in the early 1960s (C.A. App. 104).[3] As business manager, petitioner led the union negotiating committee in collective bargaining negotiations with employers represented by the Boiler & Platework Erecting Contractors Association (C.A. App. 148, 152-153) and also determined which union members of Local 5 would be assigned to any particular construction project (C. A. App. 105, 158, 293).[4]

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[2]Petitioner served as business manager for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 5, AFL-CIO, representing approximately 1400 boilermakers who build and maintain power plants in the New York metropolitan area and a number of up-state counties.

[3]"C.A. App." refers to the appendix filed in the court of appeals. We are lodging a copy of the three-volume appendix with the Clerk of the Court.

[4]After a contractor was awarded a contract to build a boiler, he would contact the union and request petitioner to send a given number of boilermakers with particular expertise (*e.g.*,

In his dealings with the Treadwell Corporation on five different projects between 1964 and 1968, petitioner received more than $65,000 in cash payoffs from Robert Spitzer, vice-president of Treadwell (C.A. App. 160–175, 186, 214). Spitzer made the payments because he had been sent unproductive workers from Local 5 and did not want that to continue and because petitioner threatened to supply alcoholic workers if payments were not made to him (*id.* at 164–168, 171–175, 178–179, 186).

In 1968 Spitzer became Treadwell's president, and thereafter petitioner collected his payoffs from Burton Willis and John Johnson, both senior vice-presidents of Treadwell who were responsible for day-to-day operations on the company's construction jobs (C.A. App. 215, 293, 296, 305–309). In return for the payoffs, petitioner assured Willis that Treadwell would be assigned productive workers and would be free from jurisdictional disputes, work slowdowns and stoppages, and violence (C.A. App. 300–301).

Initially, Willis and Johnson attempted to conceal the payments by giving petitioner checks made out to firms whose names had been supplied by petitioner. Petitioner also supplied invoices describing services not actually rendered by the named firms (C.A. App. 295–300). Later, after petitioner complained that a portion of those payments had to be used to pay income tax for the firms, the Treadwell officers changed

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certified welders, journeymen) to the project site. These boilermakers would then go on the contractor's payroll for the duration of the project, after which they might be reassigned by petitioner to another contractor or project (C.A. App. 293-294).

to a method whereby they obtained cash by laundering checks made out to sham corporations. Willis then delivered cash payoffs directly to petitioner at prearranged meeting places (*id.* at 305–313). The cash payoffs, which amounted to a figure in excess of $500,000 (*id.* at 322), were made between 1971 and 1976 in connection with major boilers ("milestone contracts") erected for the Consolidated Edison Company at Astoria, Long Island, and for the Orange and Rockland Utility Co. at Bowline Point, as well as with smaller contracts (*id.* at 315–316). Eventually petitioner began making standard payoff demands linked to the type of job involved, *i.e.*, $50,000 for a major boiler, $25,000 for a condenser, $15,000 for a stack lining job, and $200 per week per shift on small jobs (*id.* at 315–320, 361).

Petitioner also received payments and other favors from Combustion Engineering Corporation when Combustion, an out-of-state contractor, experienced difficulties in getting business in New York and in getting productive workers assigned to it from Local 5. Combustion acceded to petitioner's demand that it hire his brother as a welding foreman and to his suggestions that it award subcontracts to certain companies recommended by petitioner (C.A. App. 515–516, 520–521, 526–527). Later, after petitioner observed to John Randall, the company's construction sales director, that the firm had been enjoying labor peace on a certain job and that he was in need of money, Randall gave petitioner a total of $3000, delivering envelopes containing $1000 to him on three separate occasions (*id.* at 540–541). Petitioner assured Randall that other

contractors were paying him off as well (*id.* at 542-543).

Petitioner also received cash payments from the Champion Construction Company beginning around 1966 (C.A. App. 110). During 1969 and 1970, George Koch, the president of Champion, paid petitioner approximately $30,000, for which he was promised "better men on the job," *i.e.*, Local 5 workers with 90%, as opposed to 40%, efficiency (*id.* at 118, 137).

In addition, between 1970 and 1972 petitioner received payoffs amounting to approximately $35,000 from Thomas O'Connor Company, Inc., of Massachusetts, in return for the assignment of productive workers to the company's New York jobs (C.A. App. 871-875).

Both the person who prepared petitioner's 1975 and 1976 federal income tax returns and an IRS agent testified that none of the above payoffs from contractors was reported as income on petitioner's tax returns (C.A. App. 702-713, 754, 760-761, 768-772).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that the district court committed reversible error in its jury charge on the racketeering count (Count 1) by failing to instruct that petitioner could be convicted only if it were shown that he accepted the payments willfully and that they were made for the purpose of insuring labor peace and productivity. This argument is based on the assump-

tions (1) that the racketeering count could be sustained *only* by a jury finding that petitioner demanded or received payments unlawful under 29 U.S.C. 186(a)(4), as distinguished from payments unlawful under other subsections of 29 U.S.C. 186(a); (2) that the racketeering count could not be sustained by the payments found by the jury in convicting petitioner on Count 2, under instructions to consider petitioner's purpose in accepting payments proved under that count; (3) that petitioner had not consented to the absence of a willfulness instruction on the racketeering count; and (4) that despite the nature of petitioner's defense, he would be prejudiced by any failure to instruct on his intent in accepting the payments or the intent of those giving them to him. All of these assumptions are erroneous.

a. First, the error petitioner principally alleges (Pet. 9–10) in the charge on the racketeering count—the district court's instruction that the purpose of the payments concerned in the predicate offenses was unimportant—relates only to payments alleged as unlawful under 29 U.S.C. 186(a)(4). But the factual allegations of the racketeering count stated a violation with respect to payments unlawful under other subsections of Section 186(a) as well; the evidence of such payments was overwhelming and clearly sufficient to sustain a conviction on that count; and the jury instruction was not in error as to such payments.

Under 29 U.S.C. 186(b)(1), it is unlawful for a person to demand or receive any payment prohibited by 29 U.S.C. 186(a). The latter section specifies four categories of unlawful payments, and Section 186(b)(1)

can be violated with respect to any one of them.[5] As petitioner concedes (Pet. 8 n.1), Count 1 of the indictment—the racketeering count—does not specify any of them by number. By its reference to payments "for productive labor and labor peace" (Pet. App. A-12 through A-13), Count 1 charges petitioner with demanding and accepting payments unlawful under Section 186(a)(4). However, by its allegation that the labor organization for which petitioner acted as business manager had collective bargaining agreements with the employers alleged to have made payments to petitioner (Pet. App. A-11), Count 1 also charges violations involving payments unlawful under Sections 186(a)(1) and (2), which—unlike Section 186(a)(4)—re-

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[5] 29 U.S.C. 186(a)(1) - (2) and (a)(4) provides:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> (1) to any representative of any of *his employees* who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer, or employee thereof, *which represents, seeks to represent, or would admit to membership, any of the employees of such employer* who are employed in an industry affecting commerce; or
>
> * * * * *
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as *a representative of employees* or as such officer or employee of such labor organization. [Emphasis added.]

quire that the labor organization involved be either the actual or the potential representative of the employees of the employer making the payments, but do not require that the payment be made for the specific purpose of influencing petitioner in his actions as a union officer.[6] Since, as the district court informed the jury (C.A. App. 1186), petitioner had stipulated that Local 5 had collective bargaining agreements with the employers named in Count 1, the conviction on that count was proper so long as the jury found beyond a reasonable doubt that petitioner accepted at least two payments from any of the named employers. See 18 U.S.C. 1961(5). The evidence showed numerous payments from the named employers, so the conviction was clearly proper.

b. Even assuming that the jury had to find that petitioner demanded or received payments unlawful under Section 186(a)(4) in order to convict on the racketeering count and that the trial court erred in its instruction respecting such payments when charging on that count,[7] the error was not reversible because

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[6] Although petitioner now suggests (Pet. 4-5, but cf. Pet. 8) that the predicate offenses charged in the racketeering count were violations only with respect to Section 186(a)(4), his brief in the court of appeals, although not entirely clear, indicates his understanding that the predicate offenses involved payments unlawful under both Section 186(a)(1) and 186(a)(4) (App. Br. 10-13).

[7] We do not endorse the opinion of the court of appeals to the extent that it suggests (Pet. App. A-6) that an individual may be convicted under 29 U.S.C. 186(b)(1) of demanding or receiving payments unlawful under 29 U.S.C. 186(a)(4) without regard to the intent of *either* the person taking the payments or the person making them.

the conviction on Count 2 assures that the jury must have found that petitioner demanded or received payments that served the purpose delineated in Section 186(a)(4).[8] Count 2 alleged that Treadwell Corporation through its agent, Burton Willis, paid petitioner sums amounting to $94,000 over the period from June 8, 1974, through December 31, 1976.[9] In its charge on that count, the district court both noted that the government was urging that the payments "were made for the purpose of influencing [petitioner] in respect to his actions, decisions, and duties as business manager of Local 5" (C.A. App. 1195-1196) and instructed the jury that it must find that petitioner received the money with an intent to be influenced (C.A. App. 1198). The evidence of numerous payments from Treadwell through Willis was overwhelming and clearly sufficient to establish offenses that would sustain the conviction on the racketeering count.

c. There is no merit to petitioner's suggestion (Pet. 9) that the district court erred in its charge on the racketeering count by failing to instruct the jury that it must find that he received or demanded payments willfully. Petitioner concedes (Pet. 10) that his counsel may have "conceivably consented to" such an omission,

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[8]The jury's failure to convict petitioner on Count 3 may well reflect the fact that John Dapcich, a principal actor in the incidents there alleged (Pet. App. A-14), died before trial (C.A. App. 1149-1150).

[9]Payments by Willis to petitioner are among the predicate offenses alleged in the racketeering count (Pet. App. A-12).

and the record clearly shows such consent.[10] Petitioner's challenge here thus comes too late. Fed. R. Crim. P. 30.

d. Finally, in view of the fact that petitioner's defense consisted simply of denying that he had ever received or demanded any payments from employers (Tr. 1126–1139), and did not rest at all on any contention that the payments were not made with the requisite intent, the absence of instructions regarding the intent with which payments were made or received can hardly have prejudiced his case.

2. Relying on *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), petitioner contends (Pet. 14–17) that the district court should have held an evidentiary hearing to determine whether the IRS acted in good faith in obtaining, by administrative summons, records relating to the bank accounts of sham corporations that were used to generate cash for

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[10]The following colloquy occurred at trial (C.A. App. 1047–1048) (emphasis added):

> [The Court:] My present understanding of the law is that there is no element of wilfulness involved in either the RICO count or the Taft-Hartley counts.
>
> There is an element of knowledge, but I don't think it is an issue in this case. The evidence of the payments is not that somebody was surreptitiously putting money in his bank account when he didn't know they were doing it. If they find the payments were made, knowledge, even wilfulness would probably follow automatically. *Unless you specifically want me to charge on that aspect of it, I will simply ignore it.*
>
> Mr. Correri [Defense Counsel]: *I think it should be ignored.* I don't think there's anything in that area that [sic] [as] your Honor has indicated.

the payoffs made to petitioner by the Treadwell Corporation. The record reveals that petitioner's demand for an evidentiary hearing on his motion to suppress these and other documents did not focus on the point he now raises, and that, even assuming his demand could be construed to include a request for a hearing on the good faith of the IRS in issuing the summons, the request was properly denied.

a. On July 12, 1979, petitioner's counsel moved orally for a hearing on "the method or manner in which * * * documents which have been furnished to me, consisting of certain records of Treadwell, McCormick, and also so-called sham corporations, came into custody and control of the Organized Crime Force" (C.A. App. 1288–1289). The thrust of his remarks (C.A. App. 1289–1290, 1293–1294, 1297) and of his written motion filed two weeks later (C.A. App. 1338, 1346–1347) was that the Brooklyn Organized Crime Strike Force had been using the IRS as its own investigatory tool. He did not make the specific claim, now made (Pet. 14–17), that the IRS investigation had solely criminal prosecution purposes at the time the records in question were obtained by the IRS. Neither did he refer to the prosecutor's statement, on which he now relies (Pet. 15), that "this was a criminal investigation throughout; initially conducted by the criminal branch of the I.R.S., then conducted jointly with the Brooklyn Strike Force" (C.A. App. 1297), even though that statement was made some two weeks before petitioner filed his suppression motion.[11] Indeed, not until he

[11] Although petitioner did not cite the *LaSalle National Bank* case (C.A. App. 1337–1348), the lengthy affidavit filed by the

filed his brief in the court of appeals did petitioner rely on that statement and specifically focus on the nature of the IRS investigation alone.[12] In sum, petitioner did not clearly state to the district court the claim he now contends entitled him to an evidentiary hearing.

b. Even assuming the point was adequately raised in the district court, petitioner was properly denied an evidentiary hearing.

In *LaSalle*, an IRS agent who was conducting an investigation solely for the purpose of gathering evidence of criminal conduct, issued a summons, pursuant to 26 U.S.C. 7602, to obtain a taxpayer's bank records. This Court, holding that evidence of the agent's own intent was insufficient to establish that the summons was improperly issued, announced a two-pronged test for determining the propriety of such a summons. First, the summons must be issued before the matter is referred to the Department of Justice for criminal prosecution, since it is "at that point that * * * the criminal and civil aspects of a tax fraud case begin to diverge" (437 U.S. at 311). Second, even before that point a summons must be issued in "good faith pursuit"

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prosecutor to deny the principal charge of improper interagency cooperation also stated that there was "no basis for the defendant's claim that the strictures of *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), and related cases were violated" (C.A. App. 1354).

[12] At a hearing on August 23, 1979, petitioner raised what the district court characterized as "unfocused questions" concerning his suppression motion (Gov't Supp. App. A-11), but again failed to mention the prosecutor's statement on which he now relies to present the argument made here (*id.* at A-1 through A-11). "Gov't Supp. App." refers to a supplemental appendix filed by the government in the court of appeals.

of a congressionally authorized purpose (437 U.S. at 307-308, 318). In making this second determination, courts are required to take cognizance of the "inherently intertwined" criminal and civil elements of the tax system (437 U.S. at 309, 311). Thus, bad faith can be found only if it is demonstrated that the IRS abandoned any purpose of investigating civil tax liability with a view to collecting taxes or imposing civil tax liability and was concerned solely with gathering evidence for a criminal prosecution, freed from constraints such as warrant requirements or limitations on discovery in criminal proceedings. 437 U.S. at 316, 318.

The record reveals no basis for any *LaSalle* claim. The prosecutor, in his detailed affidavit filed in response to petitioner's suppression motion (C.A. App. 1349-1356), averred that the IRS made its decision to refer petitioner's case for criminal prosecution after the Strike Force had requested authorization for an open-ended grand jury on the basis of its own investigation (C.A. App. 1354), and he indicated by his chronology of events that this occurred after the records in question had been obtained by the IRS (*id.* at 1351-1354). He further stated that the IRS had obtained the bank records and checks in connection with the investigation of a taxpayer other than petitioner (*id.* at 1352). The sham bank account records uncovered in that inquiry "led [IRS agents] to" petitioner, and they later learned that the Strike Force was also interested in him (*id.* at 1352, 1354). Petitioner did not dispute the factual statements in the affidavit, but ar-

gued only that he might draw different conclusions (Gov't Supp. App. A-6).

The IRS investigation, both before and after petitioner's connection with the bank records came to light, was conducted by IRS special agents; but they were assisted by a regular revenue agent, and the preparation of a civil report following the criminal proceeding remained a possibility (C.A. App. 778, 781).[13] In sum, there was no investigation at all focused on petitioner at the time the records at issue were obtained, and petitioner did not allege that the investigation out of which the inquiry into his taxable income arose was solely criminal.

Nor is petitioner aided by the prosecutor's statement that "this was a criminal investigation throughout; initially conducted by the criminal branch of IRS, then conducted jointly with the Brooklyn Strike F[or]ce" (C.A. App. 1297). The prosecutor was there attempting to refute the charge of improper collusion between the IRS and the Strike Force; considered in context the statement means nothing more than that the IRS had been conducting its own independent criminal investigation before Strike Force attorneys ever learned of it. It does not impel the conclusion that criminal prosecution was the *sole* aim of the IRS investigation from the beginning or that any possibility of proceeding along civil lines had been rejected before the records were obtained.

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[13] Petitioner's suggestion (Pet. 16) that no revenue agent had been involved until five months before trial ignores the undisputed testimony of that agent that another revenue agent had been assigned to the case earlier and had left it because of illness (C.A. App. 779-780).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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